> A judicial candidate should not be encouraged to believe that the candidate can be elected to office by promising to act in a partisan manner by favoring a discrete group or class of citizens. Likewise, it would be inconsistent with our system of government if a judicial candidate could campaign on a platform that he or she would automatically give more credence to the testimony of certain witnesses or rule in a predetermined manner in a case which was heading to court.

842 So.2d at 87. The court also held that the restraints were narrowly tailored to protect the state's compelling interests without unnecessarily prohibiting protected speech, noting that "a candidate may state his or her personal views, even on disputed issues" but that "to ensure that the voters understand a judge's duty to uphold the constitution and laws of the state where the law differs from his or her personal belief, the commentary encourages candidates to stress that as judges, they will uphold the law." *Id.*

In contrast, the North Carolina Supreme Court apparently considered the pledges and promises clause suspect and, without awaiting a constitutional challenge, eliminated it from the state's code (which never had the commit clause), leaving intentional misrepresentations as the only restriction on judicial campaign speech in the state. *See N.C. Rules of Court, Code of Judicial Conduct*, Canon 7C(3). Federal courts have declared the pledges and promises clause and commit clause unconstitutional at least insofar as they might be construed to prohibit a judicial candidate from answering questions about the candidate's views of legal or political issues. *See Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), *appeal filed*; *Family*

Trust Found. of Kentucky v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. N.D. 2005).

In addition, the North Carolina Supreme Court, presumably acting from similar apprehension about the reach of *White*, has not only eliminated the canon that prohibited judicial candidates from personally soliciting campaign funds, but now expressly allows a judicial candidate to "personally solicit campaign funds and request public support from anyone for his own campaign." *See N.C. Rules of Court, Code of Judicial Conduct*, Canon 7B(4). Relying on this change, a trial court judge in North Carolina construed the court's permission to personally solicit funds as permission to campaign in the courthouse. During a recess of a session of court over which he was presiding, he called the assistant district attorney who was prosecuting the docket on behalf of the state into his chambers and requested that the attorney support and endorse him in the 2004 election in which the judge was a candidate for re-election. Although it strongly disapproved of the judge's action, the North Carolina Judicial Standards Commission felt constrained to dismiss the charges against him. *In re Graham*, Order (N.C. Judicial Standards Comm'n October 2005).

North Carolina's decision to eliminate the personal solicitation clause is consistent with the decision below and with *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002). Despite this Court's explicit statement that it was "neither assert[ing] nor imply[ing] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office" (*White*, 536 U.S. at 783), in *Weaver*, the Eleventh Circuit stated that "the Supreme Court's decision in *White* suggests that the standard for

judicial elections should be the same as the standard for legislative and executive elections." 309 F.3d at 1321. The court held unconstitutional the Georgia code of judicial conduct's prohibition on judicial candidates using:

> "any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve."

Id. at 1319.

The court also held that the solicitation clause fails strict scrutiny because it completely chills a candidate from speaking to potential contributors and endorsers about their potential contributions and endorsements "while hardly advancing the state's interest in judicial impartiality at all." *Id.* at 1322.

By contrast, the New York Court of Appeals has upheld code restrictions on activities such as participating in other candidates' campaigns, publicly endorsing other candidates or publicly opposing any candidate other than an opponent for judicial office, making speeches on behalf of political organizations or other candidates, or making contributions to political organizations. *In the Matter of Raab*, 793 N.E.2d 1287 (N.Y. 2003). Distinguishing this Court's decision in *White*, the court concluded:

> The political activity rules are carefully designed to alleviate [the concern that the public, including litigants and the bar, might perceive judges

> as beholden to a particular political leader or party] . . . by limiting the degree of involvement of judicial candidates in political activities during the critical time frame when the public's attention is focused on their activities, without unduly burdening the candidates' ability to participate in their own campaigns.

793 N.E.2d at 1293. *See also In re Dunleavy*, 838 A.2d 338 (Me. 2003), *cert. denied*, 541 U.S. 960 (2004) (upholding prohibitions on sitting judges soliciting support for political candidates and political organizations and purchasing tickets to political dinners or functions).

A federal judge in New York, however, accepted an argument that, under the decision in *White*, a state judicial conduct commission could not, consistently with the First Amendment, apply the canons to sanction a judge for participating in a demonstration at a Florida board of elections during the 2000 presidential election recount, engaging in fundraising for the county conservative party, and making payments to politicians whose party endorsements he sought. *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003). This decision was vacated on abstention grounds. *Spargo v. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2nd Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). In subsequent state court proceedings, the New York Supreme Court Appellate Division upheld the dismissal of the judge's application to prohibit the State Commission on Judicial Conduct from enforcing provisions of the code of judicial conduct restricting campaign and political conduct. *Spargo v. New York State Comm'n on Judicial Conduct*, 803 N.Y.S.2d 742 (N.Y. App. Div. 2005).

Furthermore, the *White* decision has prompted challenges and speculation beyond the canons related to campaign and political conduct. The attorney for some of the plaintiffs in *White*, for example, has argued that the rule requiring disqualification when a judge's impartiality might reasonably be questioned is unconstitutional if applied to statements made during a campaign despite Justice Kennedy's statement in his concurring opinion in *White* that adopting strict standards of disqualification is one of the less restrictive alternatives to the announce clause that states may adopt. 536 U.S. at 783 (Kennedy, J. concurring). So far, federal courts have rejected this argument. *See Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), *appeal filed*; *Family Trust Found. of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. N.D. 2005).

Some judges and experts (and news reporters) have even argued that the *White* decision should be a catalyst for relaxing the prohibition on commenting on pending cases, which has been adopted in every state and the *Code of Conduct for U.S. Judges*. *See, e.g.*, Thomas Penfield Jackson, "*Beyond* Republican Party v. White: *A Plea for Rule of Reason for Extrajudicial Speech*," 32 HOFSTRA L. REV. 1163 (2004). A California judge recently invoked this Court's holding in *White* to defend himself in a discipline case based on his comments about a juvenile case pending before him on a public television program. (The Commission on Judicial Performance rejected the argument.

Inquiry Concerning Ross, Decision and Order (Cal. Comm'n on Judicial Performance November 16, 2005)).[8]

Relying on this Court's decision, a judicial ethics advisory committee in Vermont, a state in which all judges are appointed, issued an opinion allowing judges to participate in a peace march, hold an anti-war sign, and sign a petition to the congressional delegation or the town board on issues such as energy independence and funding for a local anti-poverty agency. *Vermont Advisory Opinion 2827-6* (2003).[9] The committee stated it "must . . . apply strict scrutiny to an application of the Code which would restrict the free speech rights of a Vermont judge." *Id.*

Finally, interest groups and commentators have used the decision in *White* to pressure nominees to this Court to answer questions during the Senate confirmation process that have traditionally been considered inappropriate and irrelevant, arguing that the logic of the decision applies, not just to election campaigns, but also to the appointive process.

Some of the confusion about the logical reach of the holding in *White* is evident in the decision below. For example, the majority's statement that "[t]his case . . . is not about what happens after an election" (416 F.3d at 753) is clearly inconsistent with this Court's decision in *White*. Although this Court did not accept the argument that the announce clause was necessary to protect the state's interest in judicial impartiality, its analysis clearly

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[8] URL: http://cjp.ca.gov/pressrel.htm

[9] URL: http://www.vermontjudiciary.org/Committes/boards/vtjudethicsadcomm.htm

accepted "what happens after an election" as the relevant focus.

The independence, impartiality, and integrity of state judges is being assailed from many directions. Articulation and implementation of high ethical standards is one of the few safeguards against such attacks available to state supreme courts. The confusion that has arisen since this Court's decision in *White* undermines the judiciary's ability to maintain public confidence in the courts in the face of unfair criticism. Therefore, the American Judicature Society respectfully requests that this Court grant the writ of *certiorari* to the United States Court of Appeals for the Eighth Circuit in *Dimick v. Republican Party of Minnesota*, No. 05-506.

IV. CONCLUSION

As argued by the Petitioners, and supported by the foregoing additional reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD OF JUDICIAL STANDARDS, et al.,

Petitioners,

v.

REPUBLICAN PARTY OF MINNESOTA, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE STATE OF MISSOURI AND THE MISSOURI JUDICIAL CONFERENCE AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI

Missouri has a long history of trying to minimize the impact of partisanship in its judiciary. More than 60 years ago, the State of Missouri adopted the "Missouri Nonpartisan Court Plan," providing for merit selection and nonpartisan "retention" elections for many of its judges. Extending protection against excessive partisan influence in the judiciary beyond the Missouri Plan, the Missouri Supreme Court, authorized to regulate judicial behavior, has adopted a canon, like Minnesota's, that bars judges from personally soliciting and receiving campaign contributions. The voters and the Missouri General Assembly have also taken steps in that direction, imposing by constitutional and statutory decree limitations on the partisan political activity of judges and candidates for judgeships.

Missouri has also had a role in the development of the law that the Eighth Circuit should have applied. In 1991, the State's choices regarding judicial retirement prompted one of this Court's most significant federalism decisions. Later in the same decade, the State assisted in the development of First Amendment jurisprudence in the campaign finance context, bringing a critical question to this Court regarding limitations on campaign contributions – limitations that are intended to attack the reality and appearance of corruption, just as the regulations at issue here are intended to attack the reality and appearance of judicial partisanship.

The Missouri Judicial Conference consists of all the State's judges. Mo. Rev. Stat. § 476.320 (2000). The State and its Judicial Conference have an interest in maintaining the integrity and independence of the Missouri judiciary – both those who are appointed pursuant to the "Missouri Plan," and those who are elected. And they have an interest in preserving

the authority of the State – whether by the people in its constitution, by the legislature in its statutes, or by the Missouri Supreme Court in judicial canons – to take the steps necessary to ensure a fair judiciary in the form best suited to the needs of Missourians.

ARGUMENT

1. In a significant Missouri case decided nearly 15 years ago, this Court recognized that the states have and must be allowed to exercise their sovereign authority in determining many aspects of the nature and structure of their government – including their judiciaries. *Gregory v. Ashcroft*, 501 U.S. 452 (1991), presented a challenge based on the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. The Court began its analysis with the reiteration of a basic principle of federalism – a principle that the Eighth Circuit seems determined to ignore:

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." More than 120 years ago, the Court described the constitutional scheme of dual sovereigns:
>
> "'[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and

independent existence.'"...

501 U.S. at 457, quoting *Texas v. White*, 7 Wall. 700, 725 (1869), in turn quoting *Lane County v. Oregon*, 7 Wall. 71, 76 (1869). In *Gregory*, the Court went on to "acknowledge[] the unique nature of state decisions that 'go to the heart of representative government.'" 501 U.S. at 461, quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

The state decision at issue in *Gregory* was one regarding the qualifications of judges. The Missouri Constitution requires, "All judges other than municipal judges shall retire at the age of seventy years . . .." Mo. Const. Art. V, § 26. The Court explained that such decisions regarding the qualifications of judges go to the essence of state sovereignty:

> This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, except so far as plainly provided by the Constitution of the United States."

501 U.S. at 460, quoting *Taylor v. Beckham*, 178 U.S. 548 (1900). Then the Court cited with approval this declaration from *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892): "Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." 501 U.S. at 462.

2. If Missouri's decision to impose a mandatory

retirement age on judges went to the heart of representative government, then the matters at issue here certainly do. The respondents and the Eighth Circuit, as did the plaintiffs in *Gregory v. Ashcroft*, attack decisions that are unarguably "of the most fundamental sort for a sovereign entity": "the manner in which [its judges] shall be chosen."

Missouri's most famous manner of choosing judges is the "Missouri Nonpartisan Court Plan," now found in Article V, § 25 of the Missouri Constitution. That plan was adopted by Missouri voters by initiative in November 1940 as a popular response to the power of partisan political machines in Kansas City and St. Louis.

The Missouri Plan rejected the concept that there was an all or nothing choice – appointment v. popular election – both of which Missouri had tried at various times in its history. The new plan was a hybrid, designed to reduce the opportunity for partisan bias but to retain popular involvement. The plan creates a commission, with some members appointed by the Governor and others elected by the Bar, all with staggered six-year terms and all prohibited, while in office, from holding "any official position in a political party." Mo. Const. Art. V, § 25(d); Mo. Sup. Ct. Rule 10.03. The commission nominates three individuals to the Governor; the Governor then chooses one of the three. Mo. Const. Art. V, § 25(a). New judges must then stand in "retention elections," first at the general election after they have been in office for 12 months, then at the end of each term. Mo. Const. Art. V, § 25(c)(1).

In *White*, Justice O'Connor contrasted the Minnesota approach with the Missouri Plan: "Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri plan." *White v. Minnesota*, 536 U.S. 765, 792 (2002) (O'Connor, J.

concurring). Justice O'Connor said that Minnesota was "largely" to blame for any "problem with judicial impartiality" because it chose popular elections, rather than an appointment system (*i.e.*, the federal model) or the Missouri Plan. *Id.*

Missouri's efforts to restrain partisanship do not end, of course, with the selection and retention process. To ensure nonpartisanship, the judges chosen under the Missouri Plan are subsequently barred from most partisan activity:

> No judge . . . appointed to or retained in office in the manner prescribed in sections 25(a)-(g), shall directly or indirectly make any contribution to or hold any office in a political party or organization, or take part in any political campaign.

Mo. Const. Art. V, § 25(f).

The Missouri Plan does not yet extend to all Missouri judges. By constitutional decree, it is used to select and retain all appellate judges, as well as judges in what were, at the time of its adoption, by far the most populous jurisdictions: Jackson County and the City of St. Louis.[1] Since that time, the Plan has been extended to other counties.[2] But the remaining counties, many of which have modest populations, elect their trial court judges.[3]

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[1] The 1940 Census showed the City of St. Louis with 816,048 residents, and Jackson County, which contains most of the City of Kansas City, with 477,828. The next most populous jurisdiction was St. Louis County, with 274,230 residents.

[2] St. Louis County joined the plan in 1970. Clay and Platte counties, in suburban Kansas City, joined in 1973.

[3] Of the 155 Missouri counties (the City of St. Louis is treated as its own county), more than half have a population of less than 20,000.

Missouri has made fundamental choices about the qualifications and manner of selection of elected judges that distinguish those judges, too, from officers in other branches of government. Most notably, the Missouri Constitution sets judges apart by giving them longer terms – 6 years – than any other elected officials. Mo. Const. Art. V, § 19. Unique among Missouri elected officials, judges are required to have a particular professional qualification – that they be licensed to practice law. Mo. Const. Art. V, § 21. And they are subject to an entirely different system for removal and retirement. Mo. Const. Art. V, § 24.

Missouri's statutes, like its constitution, often treat judges differently than other officers. For example, judges are barred from practicing their profession, Mo. Rev. Stat. §§ 476.290, 478.013.2 (2000), a restriction applied only to one other high-level appointee, *see* Mo. Rev. Stat. § 630.025.1 (2000) (Director, Mo. Dept. of Mental Health). And aithough Missouri has conflict of interest statutes for public officials generally, *see* Mo. Rev. Stat. Chapter 105 (2000), it imposes additional requirements on judges, Mo. Rev. Stat. § 476.800 (2000).

Like their peers in all states and in the federal system, Missouri's judges are tasked with adjudication, and expected to perform that task without partisan influence. But having created a less-political branch, Missouri has taken advantage of the absence of partisanship to assign that branch a nonjudicial but most politically sensitive responsibility: redrawing legislative districts following the decennial census when a bipartisan citizens' committee fails to do so. *See* Mo. Const.

Voting age population reaches a low of 1805 in Worth County. (Data from the 2000 Census is available at www.census.gov.) Each county elects its own associate circuit judge. Mo. Const. Art. V, § 16.

Art. III, §§ 2, 6. Thus in 2001, a panel of appellate judges established the districts for the Missouri House of Representatives and Senate. Partisanship would defeat the very purpose of having a nonpartisan judicial panel act when a bipartisan citizens' commission fails to do so.

3. The Eighth Circuit never addresses the impact of state sovereignty, and mentions *Gregory v. Ashcroft* almost in passing, blithely distinguishing it by saying that this case, unlike that one, involves free speech. *Republican Party of Minnesota v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (en banc). The Eighth Circuit concludes that because of the free-speech implications of the Minnesota canon, it must give the state's choice "strict scrutiny," regardless of any impact on state sovereignty. In making that leap, the Eighth Circuit belittles not just *Gregory*, but another line of cases that includes one coming from the State of Missouri. Though those cases, too, address this "area of the most fundamental First Amendment activit[y]," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), they are inconsistent with a fundamental step in the Eighth Circuit's analysis.

In *Buckley* this Court rejected the claim that everyone has an "absolute" right to support candidates as they wish. *Id.* at 23. And it held that "preserving the integrity of our system of representative democracy" and fighting "the appearance of corruption" were compelling state interests that can be served by restricting campaign contributions.

Missouri entered the fray in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000), where this Court upheld Missouri's choice to impose limits on contributions to candidate committees (including committees for judges). Later, the Eighth Circuit struck down Missouri's limits on political party contributions – but reversed itself after this Court sent the case back for consideration in light of *Federal*